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DEFAMATION, DENTISTS AND DENTISTRY

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Good name in man and woman, dear my lord,
Is the immediate jewel of their souls...
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.

-Othello

INTRODUCTION

Dentistry, like every profession, is periodically confronted with "negative reporting" by journalists, environmentalists, consumer rights groups, and public health groups via newspapers, magazines, the Internet, television, and other forms of mass media. The deleterious effects of negative reporting about an individual practitioner can have widespread consequences and result in the ruination of the dentist's professional reputation, constituting a loss of income, social status, personal reputation, and emotional despair.

However, the same legal system, which affords the media the freedom of speech and expression under the First Amendment of the United States Constitution, also allows victims of libel and slander to obtain legal redress. Nevertheless, it is difficult to prove a defendant is defamed a plaintiff, as this article demonstrates. Oftentimes, the defendant has deemed to have merely exercised his freedom to express an opinion, despite the harmful consequences such statements may have. Historically, courts have been reluctant to find in favor of plaintiffs in

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such cases, preferring to err on the side of constitutional protection of an author's First Amendment rights.

Consider a recent article in *Reader's Digest*, by William Ecenbarger, entitled *How Honest are Dentists?*[1] In the article, Ecenbarger asserted that "Dentistry is a stunningly inexact science,"[2] issuing a warning to Americans to guard against obvious over-charging. Ecenbarger lamented that he was not prepared for the "astounding variation in diagnoses he received: "some wanted only $500 to bring me up to good dental health. Others wanted ten, twenty, even fifty times that amount. Surely, they could not all be right."[3] The assault upon the dental profession prompted the bright red cover of *Reader's Digest* to scream: *How Dentists Rip Us Off*,[4] perhaps an even more damaging affront than the article itself.

Although many dentists took offense at this article and its implications, the American Dental Association (ADA) decided against pursuing any legal action. For argument's sake, suppose that under some theories *Reader's Digest* could be found guilty of libel. It is not likely that whatever demands the court made upon the magazine would effectively undo previous and ongoing damage. Thus, one must contemplate whether legal recourse is the most effective means available to dentists under such circumstances.

As will be demonstrated, this type of negative reporting is difficult to combat. The writers produce it because controversy attracts readers. Magazines print it because controversy sells more magazines. Most often, courts defend it because of the broad protection afforded by the First Amendment. The losers of course, in this case, are the dentists, and by extension, the patients they treat. However, as will be discussed, there is a strong societal interest in offering broad First Amendment protection to the media and interest groups, sometimes, even at the expense of protecting some misstatements of fact.[5]

With the advent of the Internet, the means of communication have increased exponentially. By the same token, the means of damaging the

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[1]William Ecenbarger, *How Honest are Dentists?*, READER'S DIGEST, Feb. 1997, at 50.
[2]*Id.* at 52.
[3]*Id.*
[4]*Id.*
[5]"The common law of libel takes but one approach to the question of falsity ... it overlooks minor inaccuracies and concentrates upon substantial truth ... Minor inaccuracies do not amount to falsity as long as the substance, the gist, the sting, of the libelous charge be justified." State Ex Rel. Suriano v. Gaughan, 480 S.E.2d 548, 561-62 (W.Va. 1996).

reputation of individual dentists and the dental profession at large have equally expanded, as evidenced by the recent *Reader's Digest* commentary and its World Wide Web site, found at the end of the article.[6] It is this author's goal to discuss the concept of defamation and the courts' interpretation of this concept, explore the ways dentists, as well as other health care professionals have combated half-truths, to evaluate the successes and failures of these struggles, and to investigate ways to improve upon the campaign against misinformation and defamation.

THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The First Amendment to the United States Constitution reads, in pertinent part: "Congress shall make no law ... abridging the freedom of speech, or of the press."[7] Historically, courts have provided the utmost protection for these constitutional freedoms. Although the text of the First Amendment "unequivocally" prohibits Congress and the states, by incorporation, from making laws which abridge the freedom of speech,[8] "it is the decisions of the United States Supreme Court these past two hundred years that have given the amendments life ... [and provided] the basis for the kind of freedom and justice all Americans are guaranteed and enjoy."[9]

Generally speaking, the Supreme Court protects speech "unless shown to likely produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[10] There are, of course, certain narrowly-defined classes of speech which may be beyond the purview of constitutional protection. "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words ... ."[11] The Supreme Court recognizes the societal interest in "preventing and redressing attacks upon reputation,"[12] just as it

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[6]Ecenbarger, *supra* note 1, at 56.

[7]U.S. Const. amend. I.

[8]RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 5 (1992) [hereinafter FREE SPEECH].

[9]JAMES E. LEAHY, THE FIRST AMENDMENT, 1791-1991: TWO HUNDRED YEARS OF FREEDOM 17 (1991) [hereinafter FIRST AMENDMENT].

[10]Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

[11]Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[12]FREE SPEECH, *supra* note 8, at 118 (*citing* New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

recognizes the necessary restriction against speech that produces a "clear and present danger ... of a substantive evil."[13]

Despite the few permissible restrictions to free speech, the Supreme Court has provided and continues to provide broad First Amendment protection. Although some speech may be regulated, the laws, regulations, or ordinances addressing such concerns must be "carefully drafted so that maximum protection is given to the right of free speech."[14]

THE CONCEPT OF DEFAMATION

Defamation is defined as "an intentional false communication, either published or publicly spoken, that injures another's reputation or good name."[15] Defamation refers to the twin torts of slander and libel.[16] Slander is an oral defamatory statement whereas libel is a written, printed, or other physical statement.[17] The legal treatment of libel and slander is similar in all substantive respects, therefore, "defamation law is ordinarily a reference to a principle applicable to both libel and slander."[18]

Defamation emphasizes the protection of a plaintiff's reputation.[19] A successful defamation claim remedies injury to one's personal reputation. A communication is considered defamatory if it "tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[20] A plaintiff does not have the burden of proving any actual harm, rather a defamatory statement has to affect the plaintiff's reputation so as to "lower community esteem or deter others from dealing with him."[21]

Upon proving a statement was defamatory, the plaintiff must show the statement satisfies the following elements:

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[13]*Terminiello*, 337 U.S. at 4.

[14]FIRST AMENDMENT, *supra* note 9, at 136.

[15]BLACK'S LAW DICTIONARY 417 (6th ed. 1990).

[16]Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accomodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMP. L. REV. 903, 907 (1989).

[17]*Id.*

[18]*Id.*

[19]*Id.*

[20]Green v. N. Pub. Co., 655 P.2d 736, 739 (1982).

[21]Langvardt, *supra* note 16, at 908 (citing RESTATEMENT (SECOND) OF TORTS § 559 (1977)).

(1) the statement "concerned" the plaintiff (commonly referred to as the "of and concerning"[22] element);[23]

(2) the statement was false;[24] and sometimes

(3) the statement was made with malicious intent.[25]

The defamed must recognize the heavy burden placed upon him in any attempt to claim defamation. For example, at first blush, it may appear proving a statement false is not a difficult task. As discussed below, however, the falsity element may be the highest hurdle for a plaintiff to clear. In brief, the inability of the plaintiff to prove that a statement is unequivocally and verifiably false will most often lead to an immediate dismissal of the suit.[26]

The courts' willingness to grant First Amendment protection to the media is profound, and places a heavy burden of proof on a plaintiff

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[22]RESTATEMENT (SECOND) OF TORTS § 564 & comments a, b, d, g. The Supreme Court has given the "of and concerning" element constitutional status. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 288-92 (1964) (Constitution requires that evidence must show false statements "of and concerning" public official, not simply about government itself.)

[23]The plaintiff need not be mentioned by name to prove defamation. A statement can be considered defamatory "if the statement described or otherwise identified the plaintiff in such a way that a reasonable reader or hearer of the statement would regard the plaintiff as the party referred to in the statement." Langvardt, *supra* note 16, at 908 (*quoting* RESTATEMENT (SECOND) OF TORTS § 564 (1977)). Moreover, in Rosenblatt v. Baer, 383 U.S. 75, 81 (1966), the Supreme Court determined that "[T]here must be evidence showing that the attack was read as specifically directed at the plaintiff."

[24]See *supra* note 5 and accompanying text.

[25]In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court held that in addition to a plaintiff meeting the defamation common law requirements, some plaintiffs must additionally prove that the defamatory statements were made maliciously. In Gertz v. Robert Welch, 418 U.S. 323 (1974), the Court prohibited the award of presumed or punitive damages without proof of actual malice.

[26]In Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986), a private figure plaintiff (Hepps) sued a corporate media defendant for defamation. Hepps brought the suit under a Pennsylvania statute requiring the defendant to prove truth of the statements at issue. The trial court, instead of following the dictates of the statute, required that the plaintiff assume the burden of proving the falsity of the statements, rather than the defendant proving the statements' truth. Hepps was unable to prove the statements' falsity and was unable, therefore, to recover damages at trial. On appeal, the Pennsylvania Supreme Court reversed the trial court's ruling, stating that the burden of proof should remain, in accordance with the statute, on the defendant. The defendant then appealed to the United States Supreme Court which reimplemented the ruling of the trial court.

hoping to make a successful claim of constitutional infringement. The plaintiff's burden has resulted in some courts even protecting blatantly false statements.[27] For example, in *Gertz v. Robert Welch,*[28] the United States Supreme Court noted false statements are inevitable in the forum of free debate.[29] Furthermore, the Court held "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[30] Similarly in *New York Times Company v. Sullivan,*[31] the Court noted the "erroneous statement is inevitable in free debate and ... [thus] must be protected."[32]

The intention of the courts is not to encourage reckless journalism. In the *Gertz* decision it is poignantly noted that "erroneous statement of fact is not worthy of constitutional protection ... ."[33] However, by excusing falsehoods, as an inevitable cost of free debate, the healthcare practitioner is even more vulnerable to malicious attack. The courts' rationale for such widespread constitutional protection is to allow for an open debate of public health and safety issues by the media without fear of reprisal. By affording the media this protection from liability, the media can then, with less inhibition, tackle the controversial issues of the day regarding public health.

By the same token, courts recognize the unique capability of the media to thrust important issues to the forefront of public debate. Courts value this role, and consequently, are careful to protect the constitutional freedoms of speech and expression afforded by the First Amendment. Limiting these freedoms, by relaxing the burden of proof, can summarily chill the media from discussing key topics like public health and safety, for fear of ruinous liability. As stated in *New York Times Company,* "debate on public issues should be uninhibited, robust, and wide-open,

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[27]State ex rel. Suriano v. Gaughan, 480 S.E.2d 548, 561-62 (W. Va. 1996).

[28]Gertz was a prominent Chicago attorney who represented a murder victim's family in a wrongful death action. Gertz sued a magazine for falsely stating that he framed the murderer. *Gertz,* 418 U.S. at 340.

[29]*Id.* at 340.

[30]*Id.* at 341.

[31]*New York Times Co.*, 376 U.S. 254.

[32]*Id.* at 271-72.

[33]*Gertz*, 418 U.S. at 340.

and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[34]

DEFAMATION OF HEALTH CARE PRACTITIONER

Pertinently stated in the First Amendment to the United States Constitution: "Congress shall make no law ... abridging the freedom of speech, or of the press."[35] As a result, public figures, and many private individuals, have received extremely limited protection from the media's publication of information.

With this in mind, the notoriety of the plaintiff has been given special consideration by the court. The *Gertz* court distinguished a "public figure" as someone who is so famous they warrant public figure status "for all purposes and in all contexts."[36] In *Rosenbloom v. Metromedia,*[37] the plurality found First Amendment protection extended to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[38] Four justices, however, decided the court should not focus on this analysis, but rather on the notoriety of the plaintiff.[39]

In *Gertz*, the court recognized the need for increased protection for private persons. The court authorized the individual states to determine their own liability standards for defamation claims involving private individuals.[40] In doing so, the court acknowledged several reasons for allowing states to provide greater protection to private individuals than to public figures. The court noted public figures have "significantly greater access to the channels of effective communication,"[41] and are in a better

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[34]*New York Times Co.*, 376 U.S. at 270. A public official applies to "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[35]U.S. Const. amend. I.

[36]418 U.S. at 351.

[37]403 U.S. 29 (1971).

[38]*Id.* at 44.

[39]*Id.* at 57-87.

[40]"We hold that so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz*, 418 U.S. at 347.

[41]*Id.* at 344.

situation to refute a false claim. Furthermore, the court noted that private plaintiffs deserve greater protection than do public figures, assuming that private plaintiffs do not invite attention and comment by assuming the risk of publicity.[42]

Moreover, the *Gertz* court discussed the notion of an unwilling public figure.[43] In pertinent part the court noted, "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."[44] The court added the "media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual."[45]

The court granted the media tremendous latitude to assume a public figure has achieved his status voluntarily.[46] The *dicta* found in the *Gertz* opinion demonstrates the court's broad protection of the rights afforded by the First Amendment.[47]

The *Gertz* court also created a separate category of a limited-purpose public figure.[48] It deemed such individuals as those who either willingly injected themselves or were "drawn into a particular public controversy, [and who] thereby [became] a public figure for a limited range of issues."[49]

In most cases, the courts have found the plaintiff did not possess the fame or notoriety to be a public figure for all purposes; thus, the focus has

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[42]*Id.* at 345.

[43]*See, e.g., id.*

[44]*Id.* at 345.

[45]*Gertz*, 418 U.S. at 345.

[46]*Id.*

[47]However, since 1974, when the *Gertz* case occurred, the courts have come to identify the unwilling public figure, and have distinguished those plaintiffs who are dragged into public controversy against their will, as individuals deserving of more protection against defamation. In *Gertz*, the Court held that an attorney who had published books and articles confined to legal issues was not a public figure. Subsequently, in Hutchinson v. Proxmire, 443 U.S. 111 (1979), the Court found that a scientist who had received federal monies and who was thrust into a public controversy over the expenditure of public funds was not a public figure. Similarly in Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979), the Court concluded that a plaintiff who had engaged in criminal conduct was not a public figure when dragged unwillingly into public controversy. *See generally*, Brown v. Philadelphia Tribune Co., 668 A.2d 159 (Pa. Super. 1995).

[48]*Gertz*, 418 U.S. at 351.

[49]*Id.*

been primarily upon whether the plaintiff was a public figure "with regard to the subject of the alleged defamation."[50] This typically depends upon whether the plaintiff has thrust himself into the forefront of a public controversy, thereby inviting attention.[51] As a result, courts have consistently rejected that a plaintiff's particular occupation, activity, or status determined public figure status.[52] Instead, courts determine on a case-by-case basis.[53]

Public figures regardless of their respective occupation, activity, or status, may find it difficult to maintain a defamation claim. It has been eloquently stated that "[b]y voluntarily abandoning anonymity in favor of the public spotlight and its attendant heat, public figures have knowingly exposed themselves to a predictable risk of being burned."[54] Thus, public disclosure of facts concerning public figures has frequently been held to be of public concern, and therefore, non-actionable.

For a private figure to prove defamation, he must prove the statement pertained to him and was substantively false.[55] Additionally, he must show the defendant was merely negligent in making the false statement.[56]

However, for a public figure to prove defamation, he or she must prove that the statement was made with actual malice, in addition to proving the statement was false and "of and concerning."[57] This component heightens considerably the standard for proving defamation compelling the plaintiff to show the defendant either knew the statement was false or recklessly disregarded the truth.[58]

Moreover, few public figures have been successful in recovering for media disclosure of their private lives. In fact, many public figures have resigned themselves to privacy invasions of many kinds and public

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[50]19 ALR 5th 1, Section 2[b], p. 52 (1994).

[51]*Id.*

[52]*See, e.g., Id.*

[53]*Id.* (stating that a bar or club owner (Owens v. National Broad. Co., 508 So. 2d 949 (La. App. 4th Cir. 1987)) and a restaurant owner (Rety v. Sattin, 11 Media L. R. 1097 (Fla. 11th Cir. 1984)) were public figures under the facts of the case)).

[54]Joel D. Eaton, *The American Law of Defamation Through Gertz v Robert Welch, Inc and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1420 (1975).

[55]Langvardt, *supra* note 16, at 908.

[56]The courts have required private figures to show that defendants were negligent in making a defamatory statement, *e.g., Suriano*, 480 S.E.2d at 556; *Gertz*, 418 U.S. at 345-48.

[57]In *Gertz*, 418 U.S. 323 (1974), the Court prohibited the award of presumed or punitive damages without proof of actual malice, regardless of the nature of the plaintiff.

[58]*New York Times Co.*, 376 U.S. at 280 & n.20.

disclosure of personal matters. In 1984, when Frank Sinatra withdrew his lawsuit attempting to enjoin the publication of *His Way: The Unauthorized Biography of Frank Sinatra,* author Kitty Kelley announced: "The life of a public figure belongs to us, the average American citizen."[59]

With respect to health care practitioners, including dentistry, one could imagine that a popular defense to allegations of libel and slander is to claim a particular dentist is, in fact, a limited purpose public figure. In a case reminiscent of *Gertz,* journalist Barbara Faggins wrote an article entitled *West Philadelphia Dentist Charged with Fraud* which was published in the Philadelphia Tribune.[60] The dentist, Dr. Glenn A. Brown, alleged three separate statements in the article were defamatory:

(1) the headline was false, because Dr. Brown was never charged with fraud;[61]

(2) the lead sentence which asserted that Dr. Brown faced criminal charges of welfare fraud was false, because he was only investigated and was never charged;[62] and

(3) a quotation by the Auditor General's Communication Director calling Dr. Brown's conduct "unscrupulous at best" was denied as never having been stated.[63]

The article caused a stir in the community and, as a result, the plaintiff was thrust into public controversy. The newspaper claimed the dentist had achieved a certain level of notoriety by the attention from the article, and for these purposes, he had become, in effect, a "limited purpose public figure."[64] The court distinguished this case by noting the dentist merely received state reimbursement for dental work performed on

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[59]Connelly, *Kitty Kelley's Battle with Sinatra*, N.Y. DAILY NEWS, Sept. 25, 1984, at C14.
[60]Brown v. Philadelphia Tribune Co., 668 A.2d 159 (Pa. Super. 1995).
[61]*Id.* at 161 n.2.
[62]*Id.*
[63]*Id.*
[64]*Id.* at 162.

lower-income patients.[65] The dentist's name, therefore, was "not one which invited attention or public comment to [the] newspaper account."[66]

In other words, the court held Dr. Brown was not a "limited purpose public figure" since his notoriety was only a result of the defamatory article, and not from any work or behavior of his own. The court noted Dr. Brown was "thrust unwillingly" into the public fray rather than having taken steps on his own volition to achieve public figure status.[67]

In another case, *Georgia Society of Plastic Surgeons v. Anderson*,[68] a physician and a professional medical association brought an action against the authors of a medical article on the theories of libel, unfair trade practices, and intentional infliction of emotional distress. This case involved an article published in 1982 in the *Journal of the Medical Association of Georgia*, entitled *Things Are Never What They Seem, Skim Milk Masquerades as Cream.*[69] The plaintiffs asserted the article was unfairly critical of their qualifications. The plaintiffs filed suit against two physicians and the Georgia Society, alleging the three defendants conspired to write the false and disparaging commentary with malicious intent.[70]

The trial court determined the plaintiffs were limited purpose public figures and therefore, assumed the burden of showing the defendants wrote the article with actual malice.[71] Upon review, however, the Supreme Court of Georgia overturned the trial court's decision failing to find the plaintiff physicians to be limited purpose public figures with respect to the libel claim.[72] The Court cited *Gertz* and found the designation of whether or not someone is a public figure rests upon one of two alternatives: "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and, thereby, becomes a public figure for a limited range of issues."[73]

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[65] *Brown*, 668 A.2d at 162.
[66] *Id.* at 160.
[67] *Id.* at 163.
[68] Georgia Soc'y of Plastic Surgeons, Inc. v. Anderson, 363 S.E.2d 140, 141 (Ga. 1987)
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 144.
[73] *Georgia Soc'y of Plastic Surgeons*,, 363 S.E.2d at 142 (citing *Gertz*, 418 U.S. at 351).

The Court concluded the physician-plaintiffs were not "limited purpose public figures" because the controversy was "primarily a private struggle within the confines of the medical profession."[74] The Court added that the controversy manifested itself primarily in the pages of various medical journals, which generally, circulated only among medical physicians.[75] As a result, the plaintiffs were considered to be private individuals.

As noted, if the plaintiffs were able to show they were private figures, and not public or limited purpose public figures, then the standard for proving libel would be far more relaxed. Typically, a finding of negligence is all that is necessary in a private figure's claim to prove a false statement is libelous.[76] On the other hand, in order to prove libel, a public figure has to show the defendant made a false statement with malicious intent, a significantly higher standard to meet.[77]

According to the Court, the authors of the article unfairly criticized the plaintiff and professional associations by making references to shaky qualifications and smoke screens to hide deficiencies in such qualifications.[78] In addition, the Court felt the defendants were negligent in failing to perform the requisite research or investigation required to prove these assertions.[79] Furthermore, the defendants did not know the nature or the extent of the qualifications or training of the physician even though they were aware of his excellent reputation as a plastic surgeon.[80] Therefore, the court concluded the defendant's were libelous.[81]

In *State ex rel. Suriano v. Gaughan,*[82] a physician brought a libel action against a county education association and its former president in connection with a newspaper advertisement and article. In 1989, the West Virginia Legislature enacted the Omnibus Health Care Act of 1989 (OHCA).[83] OHCA required physicians who provided services to patients enrolled in one of West Virginia's state insurance programs (*e.g.,* Medicaid, Workers' Compensation, Division of Rehabilitation Services,

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[74]*Id.*
[75]*See, e.g., Id.*
[76]*See supra* note 54.
[77]*Georgia Soc'y of Plastic Surgeons,* 363 S.E.2d at 142.
[78]*Id.* at 143.
[79]*Id.*
[80]*Id.*
[81]*Id.* at 144.
[82]480 S.E.2d 548 (W. Va. 1996).
[82]W.VA. CODE §16-29D-1 (1998).

and Public Employees Insurance Agency (PEIA)) to provide services to patients in all state insurance programs.[84] Prior to this law, physicians could choose to accept only one or some of these insurance recipients and decline to accept as patients other states insureds.

Thomas Romano, M.D., provided services for state insureds covered by PEIA and Workers' Compensation state insurance programs.[85] Unhappy with the new legislation, Dr. Romano elected not to provide services to any patient covered by any of the four West Virginia state insurance plans.[86] He notified PEIA he was withdrawing his services to patients under their program and PEIA, in turn, sent a memorandum to its insureds listing Dr. Romano and the other withdrawing physicians.[87] Members of the Ohio County Education Association (hereinafter OCEA) and then-president, Joseph Suriano, Jr., received this memorandum and discussed its implications at their monthly meeting.[88] Individual members of OCEA became so enraged by the actions of Dr. Romano and the other withdrawing physicians, they placed an advertisement in two local newspapers informing the community about the actions taken by the withdrawing physicians.[89] The advertisement stated: "Your Children's Teachers and their Families Have Been Denied Health Services by These Ohio Valley Physicians."[90] Underneath this heading, twelve physicians' names appeared, including Dr. Romano's.

Subsequently, an article appeared in the newspaper regarding an anticipated rally by OCEA. Mr. Suriano's quote regarding the advertisement conveyed that public employees and teachers needed to know who is no longer available as a provider of medical services.[91] He added, "Maybe this will shake [the] doctors up. They should honor their professional code. We would not turn away one of their children."[92]

Dr. Romano sued for defamation, but the defendants contended Dr. Romano was a limited purpose public figure and could not prove they acted with actual malice.[93] Dr. Romano maintained he was a private

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[83] *Id.*
[84] *Suriano*, 480 S.E.2d at 552.
[85] *Id.*
[86] *Id.*
[88] *Id.* at 553.
[89] *Id.*
[90] *Suriano*, 480 S.E.2d at 553.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 554.

figure and the defendants acted negligently in making the defamatory remarks.[94]

As with many defamation cases, this case turned on the determination of the private, or limited purpose, public figure status of the plaintiff. The Court gave a thorough review of what it considered to be the criteria of deeming someone a limited purpose public figure. First, it noted a recent ruling by the Fourth Circuit, "a person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants."[95]

The Court then noted, "the federal courts have developed a two-part inquiry for determining whether a defamation plaintiff is a limited purpose public figure. First, was there a particular 'public controversy' that gave rise to the alleged defamation? Second, was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify 'public figure' status?"[96]

The Court then identified the "twin rationales" found in *Gertz*, noting "public figures have voluntarily waived their private status ... and have ready outlets to respond to attacks, but private figures have not and do not ... public figures 'have voluntarily exposed themselves to increased risk of injury from defamatory falsehood.'"[97]

The Supreme Court of Appeals of West Virginia adopted the following three criteria for proving whether or not a plaintiff is a limited purpose public figure:

> (1) the plaintiff voluntarily engaged in significant efforts to influence a public debate, or voluntarily assumed a position that would propel him to the forefront of a public debate, on a matter of public concern;[98]

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[94] *Id.*

[95] *Suriano*, 480 S.E.2d at 557 (citing Foretich v. Capital Cities/ABC, 37 F.3d 1541, 1553 n.10 (4th Cir. 1994)).

[96] *Id.*

[97] *Id.* (*citing Gertz*, 418 U.S. at 344-45 & 344 n.9).

[98] *Id.*

(2) the public debate or controversy and the plaintiff's involvement in it existed prior to the publication of the allegedly libelous statement; and[99]

(3) the plaintiff had reasonable access to channels of communication that would permit him to make an effective response to the defamatory statement in question.[100]

Based on the above criteria, the Court found Dr. Romano to be a limited purpose public figure.[101] With respect to the issue of changes in public health care, the Court found Dr. Romano to have "voluntarily thrust himself into the debate and sought to influence its outcome."[102] Dr. Romano, the court reasoned, wrote a large number of letters to newspapers, professional journals, fellow physicians, and government officials regarding the controversy.[103] Dr. Romano was considered to "have worked at the front to rally others, most notably physicians, to join and contribute to the assault of legislative changes."[104]

Finally, the Court found Dr. Romano did have ample means to respond to the statements in question. He was considered to be an effective and prolific writer, as evidenced by his ability to get many letters published.[105] Thus, the Court reasoned, Dr. Romano "could have responded in the very same forum, local newspapers, that was used to make the allegedly libelous charge against him."[106]

As a result, the Court concluded Dr. Romano adequately satisfied its standards required for limited purpose public figure status. Therefore, in order to meet the burden of proof, Dr. Romano had to prove the defendants acted with malicious intent.[107] Since Dr. Romano failed to prove this element, his claim of defamation was not actionable "even assuming falsity of accusation."[108] In other words, the Court buttressed the argument made as early as 1964 in the *New York Times* decision,

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[99]*Id.* at 558.
[100]*Suriano*, 480 S.E.2d at 558.
[101]*Id.* at 561.
[102]*Id.* at 558.
[103]*Id.* at 559.
[104]*Id.*
[105]*Suriano*, 480 S.E.2d at 559.
[106]*Id.* at 561.
[107]*Id.*
[108]*Id.* at 547.

acknowledging that falsehoods are an inevitable consequence of free debate, and if the public figure cannot demonstrate a defendant's malicious intent, such falsehoods are typically excused.

In a similar case, John Yiamouyiannis, Ph.D., brought a libel suit against Consumers Union of the United States, for allegedly defamatory statements made in a two-part series of articles appearing in the magazine, *Consumer Reports*.[109] Dr. Yiamouyiannis, an active opponent of the fluoridation of public water supplies, had been a paid employee of the National Health Federation (NHF), an organization opposed to fluoridation since 1974.[110]

The articles, entitled *Fluoridation: The Cancer Scare* and *The Attack on Fluoridation-Six Ways to Mislead the Public,* attacked the claims made by certain individuals and organizations that fluoridation causes, among other things, birth defects and cancer, as misleading and erroneous.[111] Dr. Yiamouyiannis claimed he was defamed in the articles, particularly in the scientific community, but also in the eyes of "his fellow countrymen to whom he has something important to say"[112] and "whom he serves and must convince."[113]

The articles questioned the credibility of Dr. Yiamouyiannis' work. Specifically, they claimed Dr. Yiamouyiannis' employer, the NHF, had roots that "run deep into the soil of medical quackery,"[114] and the NHF decided to "break the back"[115] of fluoridation efforts and "hired Dr. Yiamouyiannis to do the job."[116] One of the articles noted there was, in fact, no scientific controversy over the safety of fluoridation and the "survival of this fake controversy represents ... one of the major triumphs of quackery over science in our generation."[117]

Despite these inflammatory comments, the court focused upon the status of Dr. Yiamouyiannis. The court recognized Dr. Yiamouyiannis had been an active opponent of fluoridation for over twenty years.[118] He had "voluntarily sought and obtained the very widest publicity for

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[109]Yiamouyiannis v. Consumers U. of U.S., 619 F.2d 932 (1980).
[110]*Id.* at 933.
[111]*Id.*
[112]*Id.*
[113]*Id.*
[114]*Yiamouyiannis,* 619 F.2d at 935.
[115]*Id.*
[116]*Id.*
[117]*Id.* at 936.
[118]*Id.* at 939.

himself."[119] On the subject of fluoridation, Dr. Yiamouyiannis had authored over fifteen articles, made public speeches, expressed his views on radio and television, and testified before the Subcommittee on Intergovernmental Relations and Human Resources of the House Committee on Governmental Operations.[120] As a result of his activities, the court determined Dr. Yiamouyiannis was a "public figure" and must prove the allegedly libelous statements were made with "actual malice" in order to recover for defamation.[121] Similar to Dr. Romano in *Suriano,* Dr. Yiamouyiannis could not meet the heavy burden of proving that the articles were published with "knowledge of falsity or reckless disregard of the truth," thus his claim of defamation failed.[122]

This case, along with the aforementioned cases, demonstrates the significance of the status of the plaintiff in a defamation case. The courts seem to place as great or even greater emphasis on the notoriety of the plaintiff as on the veracity of the assertion. Dentists and physicians must be made aware that simply claiming a disparaging statement is false is hardly a guarantee such a statement will be forced to be recanted, apologized for, or found to be defamatory, even if proven to be false.

If a dentist, for example, assumes a leadership role in the dental community by lobbying colleagues, writing letters, giving lectures, or influencing public debate, he may at the same time, be jeopardizing his personal and professional reputation. Active participation in one's profession, particularly leadership efforts, is behavior rewarded by society. In fact, in Section 1-C of *The Principles of Ethics and Code of Professional Conduct of the American Dental Association (Code of Ethics)*, states "dentists ... are encouraged to be leaders in their community ... ."[123]

However, it is important to understand the potential consequences of becoming a limited purpose public figure, such as Dr. Romano and Dr. Yiamouyiannis, namely the vulnerability to attack by the media, where even a blatantly false assertion may not be actionable.

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[119] *Yiamouyiannis*, 619 F.2d at 939.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 940.

[123] American Dental Association, Principles of Ethics and Code of Professional Conduct (1997), Principle: Beneficence-Section 3.A., p. 5. [hereinafter, Code of Ethics].

THE FIRST AMENDMENT AND THE DENTAL PROFESSION

The legacy of the First Amendment and the courts' interpretation of the individual's freedom of speech and expression are of particular importance to the dentist. The Code of Ethics offers guidelines on how the dentist can and should conduct his professional life. The Code, however, does not have the force of law, and is merely a guide to assist dentists in various components of their practice, in situations such as: handling a case of suspected child abuse, what to do if confronted with a conflict of interest, and how to advertise.[124] Specifically, with respect to advertising, the Code offers the following: "Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect."[125]

With the understanding each individual dentist may choose to advertise in different ways, it is conceivable that one may elect to promote him or herself so cleverly and so prominently that he or she may achieve a certain degree of local celebrity status. Although a dentist's practice might benefit materially from such an advertising campaign, the dentist might at the same time become a public figure for legal purposes. Regrettably, the Code of Ethics does not address this issue. The Code should expand its advisory opinion regarding "Advertising" to include the potential for a dentist to attain public figure status, as well as an admonition as to what legal consequences this status might have in the face of defamation. If this status is achieved, the dentist would be considered a voluntary public figure, not one unwillingly dragged into the spotlight.

Imagine if an article, similar to the one found in *Brown,* was directed at a dentist who regularly appeared on television and radio commercials. Assume that the dentist was widely known from his advertisements as "Dr. Mintz, the Crown and Bridge Prince." Suppose Dr. Mintz touted himself as a ground-breaker in his development of a new crown and bridge procedure. Imagine further Dr. Mintz gave seminars to discuss his

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[124] *Id.*

[125] *Id.* at Principle: Veracity-Section 5.F., p. 9.

novel procedure, and also appeared on radio and television broadcasts to discuss his revolutionary techniques.

If a disparaging article directed toward Dr. Mintz appeared in the local newspaper, is it likely the court would consider Dr. Mintz a public figure? Clearly, Dr. Mintz has achieved notoriety prior to the appearance of the article. As a result, the court could find Dr. Mintz's subsequent defamation action against the newspaper and reporter for statements made in the article to be unpersuasive. Even if the statements made would be considered actionable if directed toward a typical dentist, Dr. Mintz would be without legal recourse, merely because he qualified as a public figure.

Similarly, in *Park v. Capital Cities Communications,* the court held an ophthamologist was a public figure for purposes of his defamation action against a television station based on a series of reports regarding the investigation of the physician by the state department of health.[126] The ophthamologist, Dr. Park, described himself as a pioneer and champion of a new eye surgery technique.[127] Dr. Park appeared on local television and radio stations to discuss cataract surgery and corneal transplants. He also invited network affiliate television stations to do a story on outpatient cataract surgery performed at his office.[128]

After the feature aired, an area ophthamologist wrote a letter to the television station expressing his displeasure with the story, and alerted the reporter to a state health department investigation of allegations Dr. Park performed unnecessary surgery and engaged in other unethical and illegal conduct.[129] In response, the reporter wrote a follow-up story on Dr. Park, which became the subject of a defamation action. The court held that although physicians were usually not considered to be public figures, Dr. Park qualified because he "stepped outside the private realm of his practice by actively seeking media attention. He was not involuntarily thrust into an unwanted limelight, but rather, invited favorable publicity for his practice."[130]

Of course, a public figure may still have means of redress in the face of defamation. As stated in *New York Times*, and cited many times since, a public figure can recover for defamation only when he can prove the

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[126]585 N.Y.S.2d 902 (N.Y. App. Div. 4 Dep't 1992).
[127]*Id.* at 903.
[128]*Id.*
[129]*Id.*
[130]*Id.* at 905.

statement was substantively false and made with the requisite level of culpability.[131] However, absent any component of this rigid standard, a public figure dentist, like Dr. Mintz in the above hypothetical, and Dr. Park in *Park,* is afforded far less protection than a lesser known physician.

Thus, health care practitioners should consider the potential consequences of any and all activities conducted beyond the healthcare facility. Whether a physician decides to advertise frequently, or whether a dentist decides to run for president of the local chapter of the ADA, each health care practitioner must consider the premium he places upon maintaining his privacy and the lack of legal recourse typically afforded public figures in combating negative reporting.

Defamation of the Dental or Medical Profession

The issue of defamation directed at a profession, rather than at individual professionals, requires a distinct analysis. If an article is printed lambasting and disparaging the professions of medicine or dentistry, for example, the newspaper and author may be far more insulated from a libel claim than would be had the article defamed a particular physician or dentist.

Clearly, an individual physician or dentist who is targeted in a disparaging article has a much higher incentive to do all he can to refute immediately any false claims redundant and seek restitution for any damages realized. His personal and professional reputation would be at stake, and likewise, the viability of his practice would be threatened.

However, if dentists, or dental medicine in general, were the subject of a disparaging article, the threat of defamation is somewhat diffused, and the urgency of an effective response is somewhat dampened. It is arguable that an article which disparages a profession in general, can be just as damaging to the individual professional as would be an article that targets members of that profession as a whole.

In 1989, the Natural Resources Defense Council (NRDC) issued a report which maintained children faced increased dangers created by pesticide use on food.[132] In part, the NRDC report questioned the effects

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[131]376 U.S. at 288

[132]Megan W. Semple, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403, 409 (1995-96) [hereinafter SEMPLE COMMENT]; *see*, Auvil v. CBS 60 Minutes, 800 F. Supp. 941, 942-43 (E.D. Wash. 1992) (Auvil II), *aff'd*, 67 F.3d 816 (9th Cir. 1995); *see* Leslie Roberts, *Pesticide and Kids*, 243 SCIENCE 1280

of the herbicide daminozide, also known as Alar.[133] Soon thereafter, *60 Minutes* reported on the NRDC publication, highlighting NRDC's warning about Alar, a chemical which was used by apple growers to stimulate growth and improve apples' aesthetic appearance.[134] The American public responded to the *60 Minutes* program, and boycotted apples and apple products, such as apple sauce and apple juice.[135] In addition to a dramatic decline in sales, "[p]ublic school systems in New York, Los Angeles, Atlanta, San Francisco, Chicago[,] and dozens of other cities banned apples from their cafeterias."[136]

Apple growers suffered great economic losses as a result of the boycott, and subsequently, Washington state apple growers filed suit against the NRDC and CBS for airing the broadcast.[137] The apple growers alleged that the broadcast was inaccurate and disparaging. They sued to recoup the economic losses incurred from the scare created by the *60 Minutes* report. However, the Ninth Circuit affirmed the district court's decision to dismiss the apple growers' suit.[138] Both courts held the plaintiffs failed to meet the burden of proving that the defendant's broadcast was verifiably false.[139]

A subtle, yet important, distinction exists in First Amendment law. As stated, defamation emphasizes the "protection of a plaintiff's reputation" in the sphere of personal dignity.[140] However, "product disparagement" is a type of injurious falsehood, which, if proven, allows compensation for damage to one's commercial or economic interests.[141]

With respect to product disparagement claims, the statement may disparage the plaintiff's business, its "character, its employees, its customers, or its popularity."[142] The plaintiff has the burden of proving

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(1989).

[133]*Auvil*, 800 F. Supp. at 943.

[134]*Id.*

[135]Semple, *supra* note 132, at n.47 (*citing*, Frank B. Cross, *The Public Role in Risk Control*, 24 ENVT'L. L. 888, 943 n.198 (1994)) (noting various effects of the *60 Minutes* broadcast)

[135]Semple, *supra* note 132, at 409, *citing*, Linda M. Correia, *"A" is for Alar EPA's Persistent Failure to Promptly Remove Hazardous Pesticides from the Food Supply*, 16 CHEM REG. REP. (BNA) No. 20, at 875 (Aug. 14, 1992).

[137]*See supra* note 132.

[138]67 F.3d 816 (9th Cir. 1995).

[139]Auvil II, 800 F. Supp. 941; 67 F.3d 816.

[140]Langvardt, *supra* note 16, at 907.

[141]FREE SPEECH, *supra* note 8, Section 11.02[1].

[142]W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 128 at 966 (5th ed. 1984) [hereinafter LAW OF TORTS].

effects of the statements resulted in a direct, economic loss.[143] The plaintiff must show the statements led to a decline in sales, both by proving that there was a wide circulation of the alleged false statement to third parties, and by eliminating other potential factors accounting for the decline in sales.[144]

Additionally, the plaintiff must prove the following elements for a successful product disparagement claim:

(1) the statement was communicated or published to a third person;[145]

(2) the statement played a significant role in inducing others to avoid the plaintiff;[146]

(3) the statement was false;[147] and

(4) the statement was made with malicious intent.[148]

With respect to the Alar controversy, the plaintiffs failed to meet the difficult task of proving the statements about Alar were false. Proving falsity is a dispositive element in establishing a successful claim of defamation or product disparagement. The court determined the plaintiffs did not satisfy the falsity element, even though the apple growers were successful in buttressing their claim that their product was safe.[149] For example, the EPA and the Department of Agriculture contested the findings of the NRDC report.[150] Claiming no imminent danger to children existed, the EPA, USDA, and FDA issued a joint statement urging consumers to continue to purchase apples and apple products.[151] In

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[143]Langvardt, *supra* note 16, at 918.
[144] LAW OF TORTS, *supra* note 142, at 972-73.
[145]*Id.* at 967.
[146]*Id.*
[147]*Id.*
[148]*Id.* at 968.
[149]LAW OF TORTS, *supra* note 142, at 968.
[150]Semple, *supra* note 132, at 409.
[151]*Id.*

addition, the government purchased $15 million worth of apples in an effort to show support of apple growers.[152]

Indeed, the burden of proving the falsity of a claim is a heavy one for the plaintiff. Because the effects of Alar are inconclusive it may not be enough to prove the falsity of a claim that Alar is harmful. In other words, the defendant's claim *may be* true and, therefore, their claim is *not* verifiably false. Recall that the plaintiffs (*i.e.*, apple growers) must prove the falsity of a claim, instead of the defendant (*i.e.*, CBS) proving the claim's veracity.

With respect to the suit against the NRDC, to establish a claim for defamation or product disparagement, the statement at issue must be understood to be about the plaintiff. The district court found that the NRDC report neither mentioned a particular grower nor focused exclusively on apples.[153] In truth, the NRDC report addressed the use of pesticides on twenty seven fruits and vegetables, including, but not limited to, apples. The court concluded, therefore, the statements at issue did not "concern" the plaintiffs, and since this essential element was not satisfied, the case was dismissed.[154]

The result of the Alar controversy does not bode well for other professional communities who are the objects of potentially false claims or statements. Consider a case similar in nature to the Alar controversy, instead targeting the dental industry with disparaging statements. Eerily reminiscent of the Alar controversy, *60 Minutes* aired a broadcast in 1990 suggesting silver amalgam fillings, which contain mercury, are harmful, and removal of such fillings could cure seriously ill patients.[155] In co-anchor Morley Safer's introduction, he stated: "This is the kind of story we approach with some caution. The question is: is there poison in your mouth? What you probably don't know is these so-called 'silver' fillings are 50 percent mercury, and mercury is more poisonous than lead or even arsenic."[156] *60 Minutes* buttressed these inflammatory statements primarily through anecdotal accounts. For example, according to the

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[152]*Id.* (citing, *Government Will Buy Apples Left Over from the Scare on Alar*, N.Y. TIMES, July 8, 1989 at A6).

[153]*Auvil II*, 800 F. Supp. at 944.

[154]*Id.*

[155]Transcript of CBS-TV program *60 Minutes*, December 16, 1990, as recorded by Video Monitoring Services, p. 1. [hereinafter, *60 Minutes* Transcript].

[156]*Id.*

broadcast, Nancy Yost, who suffered from multiple sclerosis, decided as a last resort to have her five amalgam fillings removed:

"Safer: She left the dentist's office using a cane and leaning heavily on the arm of a friend.

Yost: The next morning, when I presented it to my physician, I threw my cane at him and said, "Look!"

Safer: It was that quick?

Yost: It was that quick."[157]

Although some members of the dental community may be skeptical, the official stance of the profession is the use of amalgam in cavity fillings is unequivocally safe. The ADA Code notes that:

> Based on the available scientific data the ADA has determined through the adoption of Resolution 42H-1986 (Trans. 1986:536) that the removal of amalgam restorations from the non-allergic patient for the alleged purpose of removing toxic substances from the body, when such treatment is performed solely at the recommendation or suggestion of the dentist, is improper and unethical.[158]

In many ways, the "amalgam controversy" parallels the Alar controversy. Legally speaking, the dental profession would have an equally formidable task of overcoming the two burdens that befell the apple growers. First, the dental profession would have to show the statements at issue were understood to be about the profession. Although this burden was insurmountable for the apple growers, the dentists might have better luck in proving this point. Even though the *60 Minutes* broadcast did not focus on *particular* dentists (a distinct problem for the apple growers' argument), the broadcast did focus exclusively on dentists and their amalgam products. Even though the apples were one of twenty

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[157]*Id.* at 3.

[158]Code of Ethics, *supra* note 123, Principle: Veracity-Section 5.A.1 (Advisory Opinions), p. 7.

seven fruits and vegetables targeted by the NRDC report, silver amalgam was the only product targeted in the *60 Minutes* broadcast.

However, even if the dentists could prove the broadcast concerned the dental profession, the more difficult task of proving the falsity of the claim would exist. The same problem of proof that befell the apple growers would likewise befall the dentists. Whether or not amalgam is toxic to patients is not precisely the issue. The claim that amalgam is harmful *cannot be proven* to be unequivocally and verifiably false[159] and, therefore, is a burden of proof too steep for the dental community to overcome. Failure to prove the essential element of falsity, therefore, with respect to the claims made in the *60 Minutes* broadcast, would undoubtedly result in a dismissal of a potential suit.

Because the apple growers failed to mount a successful claim of defamation or product disparagement does not mean that all avenues or recourse are denied. The Alar controversy and the legal obstacles that were presented "spurred" enactment of agricultural product disparagement statutes.[160] In 1991, Steve Aquafresca, a Colorado State Representative and an apple grower, introduced a measure to the state assembly. His bill was in response to what he considered to be the "unfounded" Alar scare, and was the first in a series of state proposals known as "veggie libel laws."[161] Although the proposal was initially adopted by the state legislature, then Governor Roy Romer vetoed the bill, citing First Amendment concerns.[162] Romer noted such a law would jeopardize "constitutional protection [that] gives individuals, as well as consumer groups and researchers[,] the guaranteed right to raise legitimate questions about food safety and quality."[163] Instead, Louisiana became the first state to adopt a law prohibiting disparagement of any of the state's agricultural food products.[164]

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[159]See *60 Minutes* Transcript, *supra* note 155, p. 1. As conceded in the introduction of the *60 Minutes* broadcast, "No specific disease has yet been directly linked to mercury from fillings...."

[160]Semple, *supra* note 132, at 411(citing, *Suits Spur Product Disparagement Statutes*, NEWS MEDIA & L., Summer 1994).

[161]*Id.* at 412.

[162]*Id.* (citing Berny Morson, *Veggie Slander Bill Vetoed*, ROCKY MOUNTAIN NEWS, Apr. 30, 1991, at 7).

[163]*Id.*(citing, *Colorado Anti-Libel "Veggie Bill" Wilts Under Governor's Veto*, CHI. TRIB., Apr. 30, 1991, at C3).

[164]LA. REV. STAT. ANN. §§ 3:4501 to :4504 (noting that the chapter was later added by 1991 La. Acts 972).

The law adopted in Louisiana, and subsequently in twelve other states,[165] has surprisingly not set off an aggressive lobbying effort by consumer rights groups, environmentalists, and the media to prevent additional states from enacting similar legislation.[166]

Although the laws vary from state-to-state, they share similar language in pursuit of meeting a similar objective. Fundamentally, the statutes provide producers of food products a degree of protection against persons who disparage their products. The following elements are typical of a food disparagement statute:

(1) dissemination to the public in any manner;

(2) of false information the disseminator knows to be false;

(3) stating or implying a perishable food product is not safe for consumption by the consuming public;

(4) information is presumed to be false when not based on reasonable and reliable scientific inquiry, facts, or data;

(5) disparagement provides a cause of action for damages; and

(6) any action must be filed within one or two years.[167]

Of the above elements, number (4) is worthy of particular mention. Presuming falsity of a claim, when not based on reasonable and reliable scientific data, greatly relaxes the burden of assessing a defamation claim (where a plaintiff had to prove falsity) discussed earlier. This standard may be so dramatic that it may serve to inhibit, if not prohibit, various interest groups from discussing the issues of food product safety. Not

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[165]The thirteen states are Louisiana, Idaho, Ohio, North Dakota, South Dakota, Colorado, Florida, Mississippi, Arizona, Texas, Oklahoma, Alabama and Georgia. *Hey, Your Zucchini Wears Army Boots*, TIME, Aug. 4, 1997, at 17.

[166]Semple, *supra* note 132 at 412-23; citing, Bill Rogers, *Veggie Libel? Censored by the Food Industry*, PUBLISHERS AUXILIARY, Dec. 19, 1994, at 4 (urging readers to contact South Carolina Press Association, in an effort to oppose veggie libel law); *You Still Can't Say Beans About Georgia Produce*, ATLANTA J. & CONST., July 27, 1994, at C2 (stating that the local ACLU's position that "environmental groups have to be able to speak").

[167]LA. REV. STAT. ANN. § 3:4504.

only does this raise important public policy considerations, such as the suddenly threatened societal interest in the open and free discussion of health and safety issues, these laws may be so sweeping that they would not survive a constitutional challenge. It has been eloquently stated that, "Despite the questionable constitutionality of these provisions, their very existence may be enough to silence consumer activists and environmentalists fearing ruinous liability."[168]

First Amendment advocates fear that the threat of libel "could put a clamp on public debate of legitimate health concerns, especially as food producers explore new agricultural techniques such as irradiation, genetic engineering and fertilizers made out of recycled sewage."[169] The first major legal test of the veggie libel laws was a Texas lawsuit, in which a group of cattle ranchers sued popular talk-show host, Oprah Winfrey, for a broadcast she did regarding mad-cow disease.[170]

With respect to the amalgam controversy, the dental community was placed in a similar dilemma as the apple growers. While the prospect of lobbying for legislation to protect the profession from unsubstantiated attack may seem appealing, there are important constitutional and public policy considerations which need to be considered. Namely, would such laws, similar to the "veggie libel laws," even be considered constitutionally valid; and, if so, is the prospect of chilling the media and interest groups, for fear of ruinous liability, a worthwhile cost?

As a profession, medicine wishes to maintain a spirit of open and free debate regarding the health and safety of its products and services. Implicit within the Code of Ethics are several references to this general principle. In "Principle-Section 1-M," for example, "The dentist should inform the patient of the proposed treatment, and any reasonable alternatives, in a manner that allows the patient to become involved in treatment decisions."[171] "Principle-Section 4," states that "Dentists have the obligation of making the results and benefits of their investigative efforts available to all when they are useful in safeguarding or promoting the health of the public."[172]

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[168]Semple, *supra* note 132, at 414-15.
[169]*See supra* note 132, at 17.
[170]*Id.*
[171]Code of Ethics, *supra* note 123, at Principle: Patient Autonomy-Sec. 1.A., p. 2.
[172]*Id.*, Principle: Beneficence-Sec. 3.C., p. 5.

These guidelines compel dentists to freely discuss and debate health issues of public concern. However, by maintaining an environment of open and free debate, dentistry and medicine assume an enormous risk of attack by the media and interest groups alike. Yet, dentists and physicians willingly assume this risk, because open debate and the accompanying scrutiny defy health care professionals to work continually to improve the quality of care provided to their patients. Indeed, it is a delicate balancing act in maintaining an uninhibited forum to debate important health concerns, while at the same time, maintaining a significant level of protection from defamation and product disparagement. Understanding the protections provided by our legal system and legislature, understanding the best means to utilize these two entities, as well as understanding when not to pursue remedies in these forums present some of the greatest challenges facing healthcare practitioners individually and collectively.

How Should Dentistry and Medicine Respond to Negative Reporting?

Disparaging commentary about the profession of dentistry, such as the *Reader's Digest* article discussed above, can have a far-reaching impact. At the most basic level, patients' opinions are influenced by what they read. However, repercussions of the article can also be felt at the legislative level. In fact, according to Sally Hanners, director of public affairs for the Texas Dental Association, a reference in the *Reader's Digest* article was made in the Texas House Insurance Committee to bolster arguments against direct reimbursement legislation.[173] Dr. John Zapp, ADA executive director, stated that "We've heard of two instances where the article was used against dentistry in state legislative debate."[174]

It may seem startling that an article which has been discredited by many dentists "outraged by what they believe is a sensationalistic piece of journalism that has unfairly targeted dentistry" can carry such political clout.[175] Since the story's publication, many dentists have found the article to be flawed. Dr. Gary Rainwater, ADA president, surmised "It was a contrived situation. He deliberately withheld information ...

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[173]Laura McKee, *How Honest is Reader's Digest?*, 28 ADA NEWS 7, 8 (1997) citing Ecenbarger, *supra* note 1.

[174]*Id.*

[175]*Id.* at 10.

Communication is vital and [Mr.] Ecenbarger had already violated that trust."[176] Dr. John Thurmond, chairman of Oral Diagnosis and Radiology at Creighton University, is credited in the article with substantiating a diagnosis made by a dental student in his examination of Mr. Ecenbarger. Dr. Thurmond, upon review of the article, said, "*Reader's Digest* is selling magazines by tearing down a profession that has a good reputation ... In hindsight, I believe he was setting us up."[177] Although it may seem apparent that the *Reader's Digest* article contains misrepresentations, half-truths, and illogical conclusions, what if anything, can be done about it?

Consider the possibility of asserting a defamation claim. First, an individual dentist cited in the article would have to prove that a statement made in the article, was understood to be about or concerning him. However, upon close review of the article, one finds that whenever an inflammatory or noxious statement is allegedly made by a dentist, the identity of the dentist is withheld. Ecenbarger would only make reference to the dentist as a practitioner of a particular locale, such as his "grave-faced examiner"[178] in "Madison, Wis., ..."[179] Ecenbarger claims upon his visit to a dentist in Iowa, the examining practitioner voluntarily commented, "Your dental work is lousy."[180] Such an unsolicited comment by a dentist is a clear violation of the Code of Ethics. The Code clearly states "Patients should be informed of their present oral health status without disparaging comment about prior services."[181]

Had the statement by the Iowa dentist been falsely attributed to a specific practitioner then a defamation suit would be forthcoming against *Reader's Digest* and Ecenbarger. Not only is such a claim by the author damaging to the reputation of the Iowa dentist, but such a comment could serve as "the basis for the institution of a disciplinary proceeding against the dentist making such statements."[182] The targeted dentist would have a great incentive to immediately resuscitate his good name, and thwart any chance of facing disciplinary proceedings. However, by omitting the dentist's name, the author has effectively insulated himself and the magazine from a potential libel suit.

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[176]*Id.* at 9.
[177]David C. Steele, *How a Journalist Ripped Us Off*, AGED IMPACT, Apr., 1997, at 17.
[178]Ecenbarger, *supra* note 1, at 52.
[179]*Id.*
[180]*Id.* at 53.
[181]Code of Ethics, *supra* note 123, Principle: Justice-Sec. 4.C., p. 6.
[182]*Id.* Principle: Justice-Sec. 4.C.1. (Advisory Opinion), p. 6.

By the same token, Ecenbarger cleverly discusses selected visits to dentists by only identifying those practitioners who have performed admirably, in his estimation. At the same time, the author omitted the names of those dentists who have performed dubiously or even unethically. An excerpt highlighting this point is as follows:

> In Philadelphia I was told: "Tell me what your insurance limits are and we'll proceed from there."[183]
>
> Another example found in the article states, "Heading south, I hit one comforting practitioner in Marion, Ark., Dr. Henry Wah, who recommended $700 worth of work. Just a few miles away in Memphis, Tenn., my examiner said I could squeak by with a bare-bones approach, with "absolutely no guarantees for the future," at a cost of $5000. But what I really ought to do, he said, would be to crown all 28 teeth ... . Total cost: $13,440. He could, he assured me, do most of the job in a single day, with a 10 percent discount, if I paid cash on that day.[184]

By either disparaging unidentified dentists or commending identified dentists, Ecenbarger has shrewdly delivered his message regarding the "disturbing news about the dental profession,"[185] without jeopardizing himself or *Reader's Digest*. By not identifying any of the *bad* dentists, Ecenbarger's claims not only remain unverifiable, but he has effectively side-stepped a potential defamation claim from any individual practitioner. In short, the only statements understood to be about or concerning particular dentists, were those identified in positive terms and thus, had no complaint. On the other hand, the dentists who were disparaged were not identified and thus, had no claim.

With respect to a defamation claim on behalf of the dental profession, the "of and concerning" element would most likely be satisfied. Since the article disparages dentists exclusively, those representing the dental profession would have little problem convincing the court that the article's comments were understood to be regarding the profession in general. However, satisfying the falsity element could prove to be formidable. Ecenbarger's comments are predominantly couched in terms of opinions

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[183]Ecenbarger, *supra* note 1, at 53-54.
[184]*Id.* at 54.
[185]*Id.* at 50.

that are technically impossible to prove verifiably false.[186] By asserting that "Dentistry is a stunningly inexact science."[187] and asking: "What, then, can Americans do to protect themselves from overtreatment and overcharging?,"[188] Ecenbarger has made generalized comments that are of an inflammatory nature, yet, impossible to prove as false. In short, failure to satisfy the falsity element of the defamation claim would inevitably result in a dismissal of the suit.[189]

Moreover, a claim for product disparagement would likely be met with a similar fate. As with a defamation claim, the plaintiff would be unable to prove that the statements made in the article were verifiably false.

Another option for victims of this type of defamation is appealing to the state legislature. As discussed above, legislation similar to the veggie libel laws could muzzle the media from making future disparaging statements regarding dentistry or medicine. However, such a law would not only raise significant public policy concerns, such as the societal interest in maintaining an open and free debate of public health issues, but it may not even survive a constitutional challenge. Since the effect of the legislation would prevent the media from discussing these important public health issues (for fear of ruinous liability), the protection of the media's First Amendment rights would be called into question. Furthermore, any legislation regarding this matter would only serve as a proactive measure against future disparaging commentary, and would do little to remedy the plaintiff's current complaint against *Reader's Digest* and William Ecenbarger.

The above discussion begs the question: What alternatives are left? The First Amendment and the courts' interpretation of it have laid the foundation for an open and free debate of important public health issues. Clearly, there are risks involved when the media and interest groups are granted such broad First Amendment protection:

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[186]In Park v. Capital Cities Communications, 585 N.Y.S.2d 902, 905 (N.Y. App Div. 1992), Dr. Klementowski, an opthamologist, referred to Dr. Park as a "rotten apple." The court held that in deciding whether a remark is an expression of fact or opinion is a question of law for the court. It held that the "rotten apple" comment is an opinion and thus non-actionable, since it is "vague, ambiguous, indefinite and incapable of being objectively characterized as true or false."

[187]Ecenbarger, *supra* note 1, at 52.

[188]*Id.* at 56.

[189]To date, the ADA has not initiated a libel lawsuit against author William Ecenbarger and *Reader's Digest* regarding the article, *How Honest Are Dentists?*

> In the end, the press is the surrogate for the American public. Because the public today absorbs more news than ever before, its dependence on journalists and broadcasters is unprecedented. Thus, any balancing of the right of privacy against the right of the press to report, and the public's need to know, is not merely a journalistic dilemma, but an American dilemma.[190]

However, the targets of disparaging commentary, such as dentists in the *Reader's Digest* case, have means of recourse not confined to the legal and legislative forums. The spirit of the First Amendment is not merely to protect speech but also to encourage robust debate from all sides. As columnist Anthony Lewis succinctly stated, "Speech can be a highly effective weapon in reply to criticism."[191]

In the face of endless discovery procedure, exorbitant legal fees, and extravagant jury verdicts, potential defamation-plaintiffs should fight disparagement with responses in the public arena. In *Westmoreland v. CBS,*[192] a CBS broadcast charged General Westmoreland, the American commander in Vietnam, with conspiracy to alter intelligence on the enemy. Westmoreland denounced the broadcast as unfair. Anthony Lewis praised him in saying:

> There is every indication that General Westmoreland was able to give his critics as good as he got. From the moment the CBS documentary was shown he denounced it, and he found many platforms: *TV Guide*, broadcasts, newspapers. He succeeded to the point that the public may well have thought better of him after than it did before the documentary. He did not need a legal forum. He used the marketplace, and that is where the debate belongs.[193]

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[190]Floyd Abrams, *The Press, Privacy and the Constitution*, in FIRST AMENDMENT IN A FREE SOCIETY 49, 50 (Jonathon Bartlett ed., 1979).

[191]Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 621 (1983).

[192]Alicia C. Shephard, AMERICAN JOURNAL REVIEW (Apr. 1997). General Westmoreland withdrew his $120 million libel suit against CBS in 1985, days before it was to go to the jury. Westmoreland said in a public service announcement on behalf of the Minnesota News Council, "I know as well as any American that the courts are no answer to trying to settle disputes with the media."

[193]Lewis, *supra* note 191, at 621-22.

In response to the *Reader's Digest* article, many dentists echoed the same sentiment: "communication works both ways."[194] Dr. Ira Wolfe, a member of the Lancaster County Dental Society suggested:

> When a patient says, "Doctor, did you read the article in *Reader's Digest*, an appropriate reply might be. 'I hope you do not feel that way about us. But if you have even the slightest doubt about anything we recommend or do, I hope you would give us the opportunity to talk about it.'"[195]

Other suggestions about how to rebut the *Reader's Digest* article were offered by Dr. John Barney, a member of the Washington State Dental Association's Committee on Communications:

(1) Involve patients in their treatment plans. People very much want to be listened to by their health care providers ... . Treatment alternatives can be offered when appropriate and the patient's input should be encouraged.[196]

(2) Build immediate trust at the initial appointment by selective treatment planning. We might say, "Mrs. Jones, you need these two restorations replaced right away, but you have a number of others that can wait awhile ... . The patient is more likely to agree to future treatment plans if you have established that initial level of trust."[197]

The threat of negative reporting is as daunting now as it has ever been. With the advent of the Internet in particular, the breadth and speed of disseminating information and misinformation have increased exponentially. Dentists must be ready to respond to disparaging commentary as it presents itself. As a profession and as professionals, dentistry and dentists should resist the temptation of automatically seeking a legal and/or legislative solution to the damage caused by defamatory statements. To its credit, the ADA elected not to pursue a legal solution

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[194] ADA NEWS, *supra* note 146, at 9.

[195] *Id.*

[196] John S. Barney, *A Few Thoughts on the February Bombshell*, 28 ADA NEWS 7,4-5 (1997).

[197] *Id.*

to the amalgam controversy initiated by the infamous *60 Minutes* broadcast of 1990. Instead, the ADA issued a swift and pointed rebuttal to CBS, stating, in part, that:

> The American Dental Association is extremely concerned that the December 16 segment of *60 Minutes* on dental amalgam contained numerous inaccuracies, omitted important information and created serious misconceptions for your viewers. The opening statement by Morley Safer that this kind of story is approached with some caution is belied by the clearly biased and one-sided manner in which the story was actually presented. Perhaps most troubling is the irresponsible way in which viewers were led to the conclusion that amalgam fillings are unsafe and seriously ill patients were given hope of a miraculous cure that is unsupported by sound research and scientific evidence.[198]

The letter concluded with the following statement: "We deplore the manner in which *60 Minutes* chose to present a distorted, inaccurate, biased show that had the effect of frightening thousands of viewers and inappropriately undermining their trust in the dental profession."[199]

The ADA letter systematically refuted each claim with a concise and thoughtful rebuke. For example, with respect to the dubious anecdotes laced throughout the broadcast, the ADA stated,

> One of the most misleading aspects of the story was the over-emphasis on anecdotal reports of "cures" for a variety of serious diseases following the removal of amalgam restorations. These reports were presented as fact with no evaluation by the medical community.
>
> The National Multiple Sclerosis Society has indicated that the placebo response can be extremely high in patients with MS and that the periods of remission are characteristic of the disease.[200]

Finally, the ADA demanded CBS make an "on-air retraction and correction"[201] of the false and misleading statements, representations and innuendos made in the broadcast. The ADA's response to the amalgam

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[198]Eugene J. Truono, *Response to 60 Minutes*, 122(2) JADA 10, 12, 14 (1991).
[199]*Id.* at 14.
[200]*Id.* at 12.
[201]*Id.* at 14.

controversy is praiseworthy, however, dentistry should not limit itself to responding to negative reporting by mere counter-attack. As individual practitioners, dentists should proactively confront the ever-present threat of negative reporting through open dialogue with their patients, robust debate with their colleagues, and uninhibited communication with the media, lobbyists and interest groups.